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In the

Supreme Court of the United States

October Term, 1966

No. 1004

ARDEN FARMS CO., a Delaware corporation, and DAMASCUS MILK COMPANY, d/b/a CARNATION COMPANY, an Oregon corporation,
Appellants,

vs.

STATE DEPARTMENT OF AGRICULTURE, J. F. SHORT and KENNETH F. SAWYER,
Appellees.

On Appeal from the Supreme Court of the State of Oregon

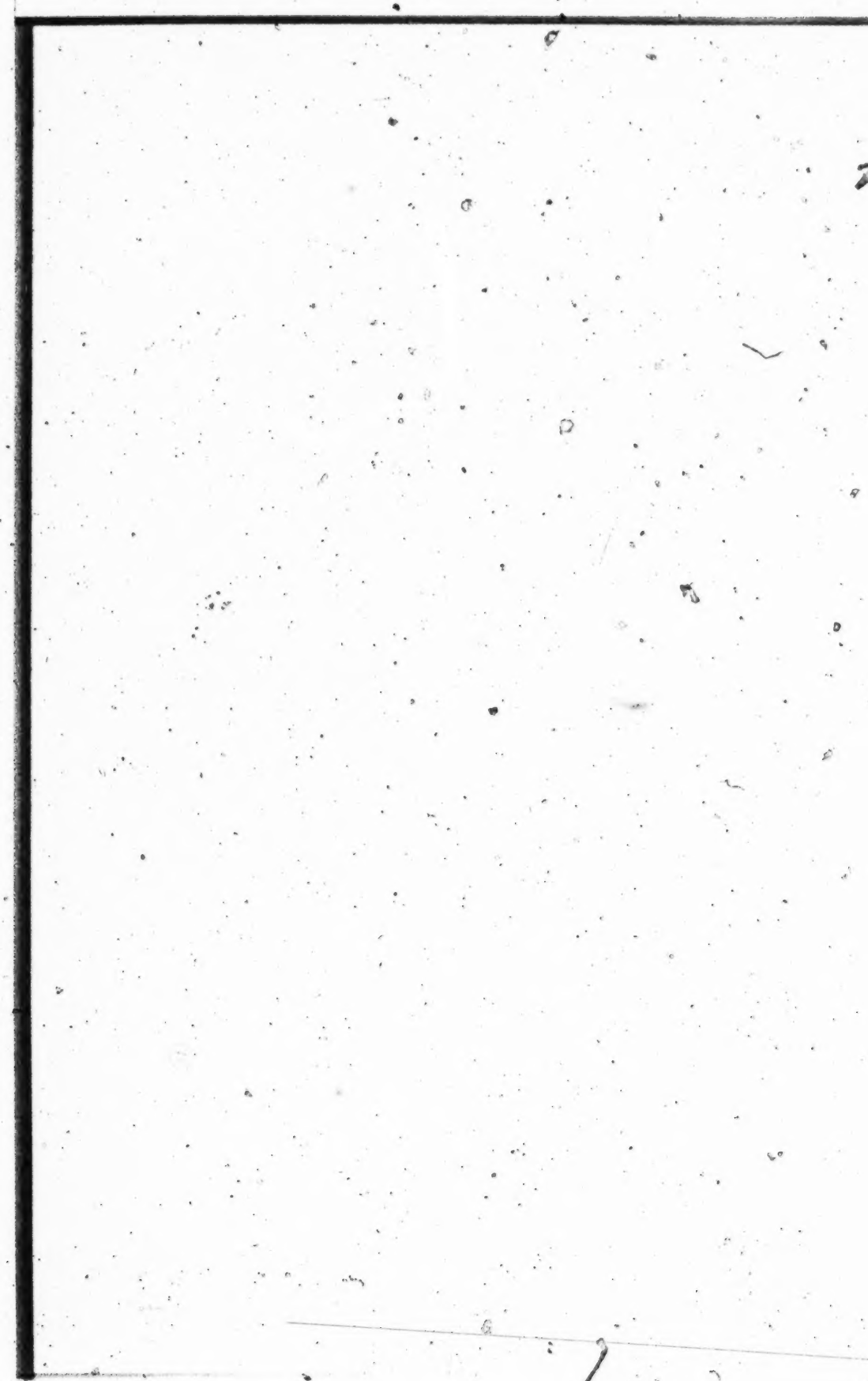
APPELLANTS' PETITION FOR REHEARING OF ORDER DISMISSING APPEAL

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Appellants petition the Court for a rehearing of its order of March 20, 1967 dismissing the appeal for lack of a substantial federal question. The petition is based on their conviction that the Court's decision sustaining a state regulation which impairs interstate commerce to protect local economic interests is a substantial departure in constitutional law, which should not be undertaken without hearing those whose interests it prejudices and issuing a reasoned opinion establishing its limits.

It is the promise of the Commerce Clause

> "* * * that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have full access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. * * *" *Hood v. DuMond*, (1949) 336 US 525 at 539.

It is that promise against which the dismissal of this appeal must be measured. Appellants showed, without contradiction or dissent, that it is the precise purpose of this regulation to protect the Oregon blend price of Grade A milk from interstate competition, that it does so by tying the local price to the domestic use of imported milk, and that its intended and certain result is to eliminate milk produced in other states from the Oregon market. These are not the doubtful speculations of a disappointed party: They are the uncontradicted economic facts of life in this interstate market, which faces extinction under the decision of the court below.

Whatever this Court may feel, there is no doubt in the public mind about the purpose and effect of the regulation. In reporting the Court's dismissal of the appeal on March 20, the evening edition of The Oregon Journal stated:

> "The decision ought to cause financial optimism among state milk producers because the milk sta-

bilization law was passed to discourage out-of-state milk imports, which tend to be cheaper than locally produced milk."

Interstate commerce in Grade A milk may be the major casualty of the Court's decision, but it assuredly will not be the only one. In the absence of an opinion expressing the Court's views, the dismissal of this appeal will encourage the legislatures and administrators of other producer states to adopt similar measures to protect local farm interests from interstate competition, measures drawn in reliance on the patently erroneous analysis of the court below which this Court has now approved. Only confusion will result if the basis of the Court's decision denying review is left to speculation.

The limits of constitutional rules are, of course, never fixed, and modifications in the demands of the Commerce Clause are not foreclosed by precedents. However, the Court's recognition of state power to protect local interests by surcharging the use of imported products, which is implicit in its order dismissing this appeal, is unprecedented and substantially alters important federal relationships. We earnestly suggest that constitutional changes of such magnitude should be undertaken only after hearing parties who represent the interests involved and on the basis of a reasoned opinion.

In light of the uncontradicted facts and the public dissent of three Justices, there can be no contention that the issues in this case are insubstantial. The Court has broken new constitutional ground by a summary decision which is, in effect, a decision on the merits. We respectfully object, and ask for reconsideration of the order of dismissal.

Respectfully submitted,

JAMES C. DEZENDORF

Counsel for Appellants

JAMES H. CLARKE

BERTRAND J. CLOSE

of Counsel

March 29, 1967

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

James C. Dezendorf

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ARDEN FARMS CO. ET AL. *v.* STATE DEPARTMENT OF AGRICULTURE ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1004. Decided March 20, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.